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Date: 10-23-89

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-10090</u>
JAMES LAWRENCE BARTLEY, III)	
)	
Debtor)	
)	
SANFORD M. TOOLE)	
MARLENE R. TOOLE)	
)	
Plaintiffs)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1014</u>
JAMES LAWRENCE BARTLEY, III)	
)	
Defendant)	

MEMORANDUM AND JUDGMENT

Sanford M. Toole and Marlene R. Toole (hereinafter "plaintiffs") have brought this adversary proceeding against James Lawrence Bartley, III, defendant, and debtor in the underlying Chapter 7 proceeding (hereinafter "defendant"), seeking judgment denying the defendant's discharge pursuant to 11 U.S.C. §727(a)(2)(A) and (a)(4)(A).¹ In accordance with the evidence introduced at the trial and argument set forth by counsel for the parties in proposed findings of fact and conclusions of law, this court makes the following findings of fact and conclusions of law.

¹At trial, plaintiffs abandoned allegations for denial of discharge pursuant to 11 U.S.C. §727(a)(3).

The defendant and Susan Redd Bartley f/k/a Susan A. Redd (hereinafter "Mrs. Bartley") were married on July 21, 1981. On May 15, 1981, the defendant and Mrs. Bartley executed a pre-nuptial agreement providing as follows:

"We, the undersigned, agree that Susan A. Redd, entering into marriage as the sole owner of a house of residence at 361 Forest Court, Martinez, Georgia will remain the sole owner of any future residence acquired after the marriage until such a time as James L. Barley desires and is able to purchase half of the equity of any future residence by payment of cash."
(Plaintiff's Exhibit No. 88)

Prior to her marriage to defendant, Mrs. Bartley owned the property described in the aforementioned pre-nuptial agreement (Plaintiff's Exhibit No. 88). Mrs. Bartley acquired the aforesaid property in her name in part through a loan acquired from Augusta Federal Savings and Loan Association which loan was extended to her based upon her ability to repay the debt (Defendant's Exhibit No. 3). Mrs. Bartley made all payments due Augusta Federal Savings and Loan Association on the loan with her own funds from the date of acquisition, September 26, 1980, through July 1, 1986. On July 1, 1986, for a consideration of Seventy-One Thousand Four Hundred and No/100 (\$71,400.00) Dollars Mrs. Barley sold the property known as 361 Forest Court, Martinez, Columbia County, Georgia. From the closing Mrs. Bartley netted Thirty-Two Thousand Two Hundred Fifty One and 56/100 (\$32,250.56) Dollars.

On October 2, 1985, for a purchase price of Seventeen Thousand and No/100 (\$17,000.00) Dollars, Kings, Inc., a Georgia corporation, conveyed by warranty deed to the defendant and Mrs. Bartley an unimproved lot designated as 56 Wildberry

Court,

Grovetown, Columbia County, Georgia (Defendant's Exhibit No. 4). The funds utilized for the purchase of the lot were obtained by Mrs. Bartley by an unsecured loan from Bankers First Federal Savings and Loan Association (hereinafter "Bankers First").

On or about April 1, 1986, Bankers First made a construction loan to Bartley Construction, Inc. for the construction of a residence at 56 Wildberry Court, Grovetown, Columbia County, Georgia. The first draw against the construction loan paid off the unsecured loan of Mrs. Bartley, the proceeds of which were used initially to purchase the lot. The defendant was engaged in the residential construction business and was the president and sole stockholder of Bartley Construction, Inc., and Mrs. Bartley was secretary/treasurer. In connection with the construction loan, Bartley Construction, Inc. executed a deed to secure debt conveying the Wildberry Court property to Bankers First to secure the construction loan in the principal sum of Ninety-Nine Thousand Three Hundred Fifty and No/100 (\$99,350.00) Dollars. The closing attorney for the construction loan failed to obtain a transfer of title from the defendant and Mrs. Bartley to Bartley Construction, Inc. at the time of closing of the construction loan.

By deed dated July 30, 1986, the defendant and Mrs. Bartley conveyed the property at 56 Wildberry Court, Grovetown, Columbia County, Georgia to Bartley Construction, Inc. to correct the error committed at closing of the construction loan from Bankers First on April 1, 1986. In addition, on July 30, 1986, Bartley Construction, Inc. conveyed to Mrs. Bartley the

property and completed improvements (a house) constructed thereon known and

designated as 56 Wildberry Court, Grovetown, Columbia County, Georgia for a consideration of One Hundred Three Thousand and No/100 (\$103,000.00) Dollars (Defendant's Exhibit No. 6). At the time of this transaction the property was valued at One Hundred Fifty-Five Thousand and No/100 (\$155,000.00) Dollars. In connection with the purchase of the Wildberry property, Mrs. Bartley executed a note in the principal sum of Seventy-Thousand and No/100 (\$70,000.00) Dollars (Defendant's Exhibit No. 7) and the balance of sums necessary to close in the amount of Thirty-Three Thousand and 90/100 (\$33,000.90) Dollars in cash was provided by Mrs. Bartley from the proceeds from the sale of Mrs. Bartley's former residence at 361 Forest Court, Martinez, Georgia, plus other funds of Mrs. Bartley totaling Seven Hundred Forty-Nine and 34/100 (\$749.34) Dollars. On or about October 16, 1987, Mrs. Bartley obtained a "H.O.M.E. LINE OF CREDIT AGREEMENT" from Bankers First with a credit limit of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars secured by a second security deed covering the Wildberry Court property (Defendant's Exhibit No. 8). The defendant has contributed nothing toward the payments required under the notes and security deeds from Mrs. Bartley to Bankers First since the purchase of the Wildberry Court property by Mrs. Bartley on July 30, 1986.

On December 30, 1985, the plaintiffs entered into a contract to purchase a house from defendant covering the property designated as 242 Brooks Drive, Martinez, Columbia County, Georgia (Plaintiff's Exhibit No. 11). On March 14, 1986 closing occurred

on the sale of the Brooks Drive premises to the plaintiffs from Bartley Construction, Inc. (Plaintiff's Exhibit No. 54).

immediately following closing, the plaintiffs discovered and disclosed to the defendant certain defects in the construction of the Brooks Drive premises. On June 1, 1986, an attorney retained by the plaintiffs corresponded with defendant regarding the defects in construction, and, thereafter, a meeting was held between the parties. A subsequent meeting again took place at the Brooks Drive premises on July 12, 1986.

On February 10, 1987, suit was instituted by the plaintiffs in Columbia County Superior Court for fraud and negligence against defendant and Barley Construction, Inc. (Plaintiff's Exhibit No. 11). On September 25, 1987, consent judgment was entered against Barley Construction, Inc. and defendant individually, for Seventeen Thousand Five Hundred Seventy and 86/100 (\$17,570.86) Dollars, plus costs for a total sum of Seventeen Thousand Six Hundred Fifty-Five and 36/100 (\$17,655.36). A Fi.Fa. was issued on October 1, 1987, against Bartley Construction, Inc. and defendant, and entry of the Fi.Fa. was made on the general execution docket for Columbia County, Georgia (Plaintiff's Exhibit No. 13). On February 4, 1988, post-judgment discovery was instituted by counsel representing the plaintiffs herein against Bartley Construction, Inc. and defendant (Plaintiff's Exhibit No. 12). Responses were filed by defendant and Bartley Construction, Inc. on December 14, 1988, wherein defendant responded to one of the interrogatories that he did not own any

real estate after June 16, 1986.

On January 24, 1989, the defendant executed his petition for relief under Chapter 7 of Title 11 United States Code and on January 7, 1989, the petition was filed (Plaintiff's Exhibit No. 1). On March 6, 1989, at the first meeting of creditors, the following exchange took place:

UNKNOWN SPEAKER: . . . And according to the record I looked at in Columbia County, the property at Wildberry Court was originally bought by Susan James Bartley, transferred to Barley Construction Company, and transferred back to Susan Bartley.

MR. WALKER: Is that true, Mr. Bartley?

MR. BARTLEY: I'd have to look back. The lot . . . what it was Banker's First handled the construction loan and all for it. The lot was purchased two years prior to me going into the building business, and to my knowledge. like I say, I can't remember . . . I'm sure it was purchased in her name.

MR. WALKER: Well, that's what you said, but that's not what he said.

MR. BARTLEY: Well, I'm just saying that was my knowledge of it.

MR. WALKER: All right.

MR. BARTLEY: Upon her selling her house on 361 Forest Court . . .

MR. WALKER: Uh-huh (yes).

MR. BARTLEY: . . . Bankers First had my company to purchase the lot from Susan Redd Barley, all right, so the loan would be collateralized up with that piece of property, which Barley Construction purchased it from Susan Redd Barley. Barley Construction built a house on it, and then in turn she acquired her own financing, and purchased a house back from Barley Construction.

MR. WALKER: Okay. What did you pay for the lot?

MR. BARTLEY: The lot was . . .

MR. WALKER: We're talking about Wildberry Court, now.

MR. BARTLEY: Right.

MR. WALKER: So your company bought the lot from her?

MR. BARTLEY: Uh-huh (yes).

MR. WALKER: All right. How much did you pay for it?

MR. BARTLEY: I paid \$14,500. I think it was . . . wait a minute, \$17,500; excuse me.

MR. WALKER: All right. And then built a house that was owned by Barley Construction Company?

MR. BARTLEY: Right.

MR. WALKER: And then Barley Construction Company had its own construction financing?

MR. BARTLEY: Through Bankers First.

MR. WALKER: And then at the time of the permanent loan where did the title go for Barley Construction.

MR. BARTLEY: Bartley Construction Company, that house was closed and titled in the name of Susan Redd Bartley.

MR. WALKER: And only her?

MR. BARTLEY: Only her. I am not on the financing or any whatsoever.

MR. WALKER: And never have been since the house was originally constructed?

MR. BARTLEY: And haven't now. And never have been able to make one payment on it.

UNKNOWN SPEAKER: Mr. Bartley, has have you transferred any property from Bartley Construction to your wife?

MR. BARTLEY: Huh-uh (no).

UNKNOWN SPEAKER: In the case of the property at 56 Wildberry Court . . .

MR. BARTLEY: Uh-huh (yes)

UNKNOWN SPEAKER: So you have no . . . never had, and presently do not have any interest in that property?

MR. BARTLEY: Huh-uh (no).
(Transcript of 341 meeting of James Lawrence Bartley, III held on March 6, 1989-at 2:00 p.m., before James D. Walker, Jr., trustee.
(Plaintiff's Exhibit-No. 80)

As of the date of the trial of this adversary proceeding the defendant still resided at the Wildberry Court property with his wife, Mrs. Bartley, and their children.

From this rather convoluted factual scenario, plaintiffs seek a determination that the defendant, with the intent to hinder, delay or defraud a creditor, the plaintiffs, has concealed property of the defendant within one year of the date of the filing of the defendant's petition under a Chapter 7, and that the defendant knowingly and fraudulently in or in connection with the underlying Chapter 7 proceeding made a false oath or account. See, 11 U.S.C. §727(a)(2)(A) and (a)(4)(A). Both contentions are without merit. In support of plaintiffs' position regarding the §727(a)(2)(A) allegation of fraudulent concealment of property, plaintiffs rely upon In re: Alexander Joseph Olivier, 819 F.2d 550 (5th Cir. 1987). Without regard to the application of the legal principles set forth in Olivier, from the facts presented, the plaintiffs have failed to establish by clear and convincing evidence that the defendant has concealed property. In re: Cutignola, 87 B.R. 702 (Bankr. M.D. Fla. 1988) (Objecting party must prove by clear and convincing evidence that the debtor should be denied discharge). It is plaintiffs' theory that the conveyance of the property and improvements at 56 Wildberry Court valued at One Hundred Fifty-Five

Thousand and No/100 (\$155,000.00) Dollars to Mrs. Bartley for a total consideration of One Hundred Three Thousand and No/100 (\$103,000.00) Dollars constituted an act of the defendant to conceal property of the defendant with the intent to hinder, delay or defraud a creditor within one year of the date of the filing of the defendant's petition under Chapter 7. Bartley Construction, Inc., a corporate entity existing under the laws of the State of Georgia, conveyed the improvements valued at One Hundred Fifty-Five Thousand and No/100 (\$155,000.00) Dollars to Mrs. Bartley, the secretary/treasurer of the corporate entity, for a consideration of One Hundred Three Thousand and No/100 (\$103,000.00) Dollars, not the defendant. While delayed through a closing attorney's error from April 1, 1986 to July 30, 1986, all that defendant conveyed was his undivided one-half interest in an unimproved lot, the Wildberry Court property, for \$17,000.00, the same amount of the purchase price in October, 1985. There were no allegations made by plaintiffs, nor is there any evidence to support such an allegation, that the corporate entity, Bartley Construction, Inc., should be regarded as the alter ego of the defendant and that the corporate veil should be disregarded by this court in denying a discharge to the defendant.² Stewart Brothers. Inc. v. Allen, 189 Ga. App. 816,

²While plaintiffs make this leap to the defendant through the corporate veil of Barley Construction, Inc. in their proposed findings of facts and conclusions of law, the facts simply do not support such a contention. In the underlying state lawsuit which is the basis of the plaintiffs' position as a creditor in the defendant's Chapter 7 bankruptcy proceeding, litigation was instituted against both defendant and the corporate entity as co-defendants. No representations have been made to this court that the state court litigation was based upon a theory of alter ego or piercing the corporate veil, nor does the complaint in the state court action support such a theory of recovery. In the litigation

377 S.E. 724 (1989) (Courts allow the piercing of the corporate veil when the parties disregard the separateness of legal entities by commingling and confusing properties, records control, etc.)

Plaintiffs contend that the defendant should be denied a discharge based upon the provisions of 11 U.S.C. §727(a)(4)(A). Plaintiffs contend that the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. In plaintiffs' proposed findings of fact they highlight three instances to support plaintiff's contention. First, plaintiffs contend that defendant made a false oath in the Superior Court of Columbia County, Georgia on December 14, 1986, wherein he stated that he did not own any property after June 16, 1986. As noted in the previous findings of fact, the conveyance of the debtor's undivided one-half interest in the lot at 56 Wildberry Court did not occur until July 30, 1986, but should have occurred on April 1, 1986. Even if this court finds this statement made in the connection with the postjudgment discovery proceedings in the Superior Court of Columbia County, Georgia, as knowingly and fraudulently false, it cannot be said that false statement was made in or in connection with the debtor's underlying Chapter 7 bankruptcy proceeding. See, In re: Ellison, 34 B.R. 120 (Bankr. M.D. Ga. 1983).

the corporate entity was recognized as a separate and distinct defendant and treated as such, and no evidence has been brought to this court's attention that would justify treating these two entities, defendant individually, and the corporate entity, any differently. Whether the conveyance from the corporation to Mrs. Barley can be challenged under O.C.G.A. ~18-2-1 et seq. is a matter for another court, as neither the corporate entity nor Mrs. Barley are debtors in this court.

Additionally, plaintiffs point to the discrepancy between the statement made under oath by the defendant in this adversary proceeding at the trial to the effect that his total income for the year 1986 was Twelve Thousand Five Hundred and No/100 (\$12,500.00) Dollars which conflicts with the defendant's schedules and statement of affairs in the underlying Chapter 7 proceeding wherein he stated under oath his 1986 income as Eleven Thousand and No/100 (\$11,000.00) Dollars. Granting that one of the two statements must in fact be false, mere falsity is insufficient. There must be a showing by clear and convincing evidence that the false statements were knowingly and fraudulently made. From the facts presented, this court fails to see what fraud could have been perpetrated by the debtor by virtue of his either under or overstating his 1986 income by One Thousand Five Hundred and No/100 (\$1,500.00) Dollars. At no point in the underlying Chapter 7 proceeding, nor in this adversary, was the debtor's 1986 income an issue. A discharge may be denied under this provision of §727 only if the false oath related to a matter material to the condition of the estate or the debtor's entitlement to discharge. 4 Collier on Bankruptcy ¶727.04 (L.King 15th Ed. 1989); In re: Fischer 4 B.R. 517 (Bankr. S.D. Fla. 1980).

Finally, the plaintiffs point to the responses given by the defendant to questioning by the trustee at the 341 meeting as set forth above. The testimony reveals confusion and lack of diligent preparation by the debtor for his testimony. However, this court does not find that the testimony amounts to a reckless disregard of both the serious nature of the proceeding and the

necessity for attention to detail and accuracy in answering, to rise to the level of fraudulent intent. In re: Mazzola, 4 B.R. 179 (Bankr. D. Mass. 1980); 4 Collier on Bankruptcy supra. From the reading of the testimony at the 341 meeting, this court cannot determine that the statements made by the defendant were knowingly and fraudulently false as required under §727(a)(4)(A).

Having determined that the complained of property transfer was made by Bartley Construction, Inc. and not the defendant as required under 11 U.S.C. §727(a)(2)(A), and that the debtor did not knowingly and fraudulently make a false statement or an account in or in connection with the underlying bankruptcy proceeding, judgment is ordered entered for defendant/debtor, James Lawrence Bartley, III and against plaintiffs, Sanford M. Toole and Marlene R. Toole. No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 20th day of October, 1989.